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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANDREW MICHAEL THWEATT, Defendant and Appellant.	E063727 (Super.Ct.No. FVA1200668) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Cara D. Hutson, Judge. Affirmed.

Law Office of Philip Deitch and Philip Deitch for Plaintiff and Respondent.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Theodore M. Cropley and Warren J. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant and appellant, Andrew Michael Thweatt, of the attempted, premeditated, and deliberate murder of Jeromy Campbell (Pen. Code, §§ 664, 187, subd. (a))[1] and shooting from a motor vehicle (§ 26100, subd. (c)). The jury also found true a number of firearm and conduct allegations to enhance his sentence. (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a), 12022.7, subd. (a), 12022.53, subds. (b)-(d).) The trial court sentenced defendant to prison for 32 years to life.

On appeal, defendant contends there was insufficient evidence supporting his conviction on both counts. Alternatively, he contends the evidence showed, at best, that he acted under the heat of passion and not with premeditation and deliberation. We conclude there was substantial evidence to support the verdict and affirm.

II. FACTS

In May 2012, Officer Jonathan Plummer of the San Bernardino Police Department was undercover and assigned to a gang task force with the Federal Bureau of Investigation. He was surveilling a park in Rialto one morning and witnessed a conflict between two men approximately 30 to 50 yards away from his parked car. One man was later identified as defendant. The two men were unrelated to the group that Officer Plummer was surveilling, as far as he knew.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Defendant drove up in a tan or brown sedan. He got out of his car and argued with the victim. Officer Plummer believed defendant and the victim were arguing based on their hand movements, demeanors, and the fact that "they were pretty much in each other's faces." At one point, defendant lifted up his shirt and exposed his waistband, but the officer could not see whether anything was in the waistband. Defendant got into his car and tried to run over the victim. After defendant's car missed the victim, Officer Plummer heard two "pops" that sounded like backfire or gunshots. Defendant drove off and the victim collapsed to the ground in the street.[2] A few weeks after this incident, Officer Plummer identified defendant as the driver of the brown car in a six-pack photographic lineup. He also identified defendant at trial as the driver of the brown car.

Fred Rhodes was also at the park in Rialto and witnessed the incident between defendant and the victim. He was far enough away that he could not hear what they were saying, but he saw two men arguing in the cul-de-sac next to the park. After they argued for several minutes, the victim got into a blue El Camino and started to make a three-point turn as if he was leaving. Instead, he got out again and bent down at the front of his car. In the brown car, the second man "floored the gas" and drew up next to him.

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[2] There was conflicting evidence about whether Officer Plummer observed these events from the east or west side of the street. Officer Plummer testified he was on the east side of the street. An officer from the Rialto Police Department, Crystal Gonzalez, took his statement about the incident. Officer Gonzalez's report stated that he was parked on the west side of the street. He denied telling Officer Gonzalez this and said the report was incorrect. Officer Gonzalez testified that she erred in her report—Office Plummer said he was parked on the east side of the street, not the west side. She realized the error when she was reviewing her report, right before she and Officer Plummer testified.

Rhodes heard the driver of the brown car say, "Nigga, I taught you everything you know," and then two gunshots, after which the brown car "took off." The victim staggered and collapsed to the ground.

Law enforcement responded to the scene and discovered the victim lying in the street. The victim described pain in his right thigh and left hand. He appeared to have a gunshot wound to his right thigh. An x-ray revealed his right femur had multiple fractures associated with metallic debris. The metallic debris could have been a bullet that broke up when it struck the femur. He also had a cut on one finger.

III. DISCUSSION

Defendant argues the evidence showing he was the shooter was insufficient. He contends there was a reasonable inference pointing to his innocence that the jury was required to credit. But assuming he was the shooter, defendant contends the evidence shows "beyond question" that he shot the victim under the heat of passion, reducing his offense to attempted voluntary manslaughter. Based on our review of the record, substantial evidence supports his conviction.

The rules we apply are well settled. "'In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier

could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence . . . . [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] We do not reweigh evidence or reevaluate a witness's credibility.' [Citations.] 'Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction.'" (*People v. Brown* (2014) 59 Cal.4th 86, 105-106.)

Here, the record contains ample evidence to support the jury's conclusion that defendant was the shooter. Officer Plummer identified him in a photographic lineup not long after the shooting and confirmed that identification at trial. Defendant and the victim argued in the street, during which time defendant lifted his shirt and exposed his waistband. He tried to run over the victim and told him, "Nigga, I taught you everything you know." Then two shots rang out, defendant sped off, and the victim collapsed with a gunshot wound to his thigh. Although no one saw a gun on defendant's person, the jury could reasonably deduce from this chain of events that defendant brandished a gun when he lifted his shirt and then used it to shoot the victim.

Defendant does not object to the reasonableness of this conclusion. Instead, he asserts there is another inference from the evidence that is equally reasonable, and the jury was required to accept this other reasonable inference. This argument suffers from several problems.

To begin with, defendant's proposed alternative conclusion is not a reasonable inference from the evidence. He posits that the shooter may have been an unidentified gang member at the park, arriving at this conclusion because Officer Plummer belonged to a gang task force and was there conducting surveillance. This theory amounts to pure speculation. The officer's surveillance explained his presence at the scene. But he did not believe defendant and the victim were related to the group he was surveilling. There was no evidence that defendant or the victim was a gang member such that the victim might be the target of gang activity. There was no evidence that the victim interacted with anyone at the park besides defendant. And, there was no evidence that someone other than defendant had reason to shoot the victim. Defendant's guesswork does not constitute a reasonable inference. (*People v. Raley* (1992) 2 Cal.4th 870, 891.) Far from it, his speculation leads to an unreasonable conclusion.

Defendant appears to be relying on CALRCIM No. 224, in which the court instructed the jury: "Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. Also, before you may rely on circumstantial evidence to find the defendant guilty, you

must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable." In accordance with this instruction, if the jury considered the theory that defendant now posits, it clearly rejected the theory as an unreasonable inference.

Moreover, even assuming defendant's alternate theory amounted to a reasonable inference, we may not reverse the judgment on this ground. Defendant's argument ignores the rule that we may not reverse """simply because the circumstances might also reasonably be reconciled with a contrary finding."""" (*People v. Brown*, *supra*, 59 Cal.4th at p. 106.) An appellate court may reverse for insufficient evidence only if "it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) That is not the case here.

Defendant also challenges the prosecution's case for relying on conflicting or disputed evidence. He argues that Officer Plummer was not sure there had been a shooting at the time and said the "pops" could have been backfire from a car; the officer did not hear defendant say, "Nigga, I taught you everything you know"; and the conflicting evidence about Officer Plummer's position on the street and Officer Gonzalez's last minute amendment to her report on that subject renders their testimony

suspect. Defendant relies on these conflicts and disputes to no avail. Resolving conflicts or inconsistencies in the evidence and assessing the credibility of witnesses is the exclusive province of the jurors, and we assume they resolved all conflicts in favor of the verdict. We may not reweigh these questions. (*People v. Brown*, *supra*, 59 Cal.4th at p. 106.) Further, the jurors were free to believe Rhodes's testimony about what he heard defendant say without corroboration from another witness. The testimony of a single witness is sufficient, unless it "'is physically impossible or inherently improbable,'" which it is not here. (*Ibid.*)

Defendant alternatively argues the evidence was insufficient to show he acted with premeditation and deliberation, relying on the evidence that he and the victim argued leading up to the shooting. He asserts the "only" conclusion possible was that he acted under the heat of passion. To the contrary, the jury could reasonably infer that he acted with premeditation and deliberation.

"'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.] 'The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . ."'" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

"Heat of passion is a mental state that . . . reduces an unlawful killing from murder to manslaughter. Heat of passion arises if, '"at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment."'" (*People v. Beltran* (2013) 56 Cal.4th 935, 942, fn. omitted.) "The provocation must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment." (*People v. Lee* (1999) 20 Cal.4th 47, 60.)

Here, substantial evidence supports the conclusion that defendant weighed the considerations in advance of shooting the victim. They argued and then retreated to their cars. Defendant had time to consider his actions when the victim tried to drive away and then got out of his car. He chose to try to hit the victim with his car. When that did not injure the victim, he had yet more time to reconsider his actions. He chose to say something provocative and shoot twice at the victim. There is no evidence that whatever the two were arguing about was sufficient to inflame an average person to such an extent that he or she would lose reason and judgment. The court instructed the jury on a heat of passion killing, and the jury believed otherwise. (CALCRIM No. 603.) We thoroughly reject the notion that the evidence supports only a heat of passion killing and refuse to disturb the jury's well-supported conclusion.

IV. DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

MILLER
J.

SLOUGH
J.